

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TICOR TITLE COMPANY, *et al.*,
Plaintiffs,

v.
KIAVI FUNDING, INC.,
Defendant

NO. 22-cv-832

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs commenced this lawsuit to seek a declaration from the Court that they owe no duty to defend and indemnify the Defendant under a title insurance policy. Currently pending before the Court are Defendant's Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment. ECF Nos. 12, 16. Having reviewed the motions, the oppositions thereto, the record of the case, and the relevant legal authorities, the Court will DENY Defendant's motion and GRANT Plaintiffs' motion. The reasoning for the Court's decision follows.

II. BACKGROUND

The parties do not dispute the underlying facts of this case. *See* Def.’s Mot. 2-5, ECF No. 12; Pls.’ Mot. 2-8, ECF No. 16. Kiavi Funding, Inc. (“Kiavi”), previously known as LendingHome, held the Deed of Trust on a property in Everett, Washington owned by a real estate developer, Tang

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

1 Real Estate Investments, Inc. (“Tang”). In the fall of 2021, Kiavi agreed to refinance Tang’s loan.
 2 Tang selected Escrow Services of Washington LLC (“ESW”), owned by Lynn Rivera, to provide
 3 closing and escrow services on the refinance. Kiavi gave Rivera the discretion to choose the title
 4 insurer and stated its requirement for a preliminary title commitment¹ and a Closing Protection
 5 Letter (“CPL”). On September 3, 2021, Rivera obtained a preliminary title commitment and CPL
 6 in favor of Kiavi from Ticor Title Company (“Ticor”), as agent for Commonwealth Land Title
 7 Insurance Company (“Commonwealth”).

8 On September 13, 2021, Ticor’s Sub-Escrow Department sent wiring instructions to Rivera.
 9 On September 17, 2021, Rivera issued a “Borrower’s Estimated Settlement Statement,” which
 10 included charges for the title policy and sub-escrow with Ticor, and which were to be paid to Ticor
 11 at closing from the total loan amount. Rivera provided the preliminary title commitment, the CPL,
 12 and Ticor’s wiring instructions to Kiavi. The loan transaction closed on October 22, 2021, and the
 13 Deed of Trust from Tang to Kiavi was recorded. Rivera then instructed Kiavi to send the loan funds
 14 to ESW rather than Ticor. Kiavi questioned the change, asked for confirmation, and asked for a
 15 modified CPL, which it did not receive.

16 Kiavi paid the loan funds and the sum of \$931.06 for the title insurance policy by wire
 17 transfer to ESW’s bank as instructed by Rivera. Although it addressed the wire to “Ticor Title
 18 Company, attn: Lynn Rivera,” the funds were not wired to Ticor’s bank account as Ticor had
 19 instructed. Rivera did not forward the funds to Ticor’s sub-escrow account and did not forward
 20
 21

22 ¹ “[A] preliminary commitment is a statement submitted to the potential insured establishing the terms and
 23 conditions upon which the title insurer is willing to issue a title policy.” *Barstad v. Stewart Title Guar. Co., Inc.*, 145
 24 Wn.2d 528, 536, 39 P.3d 984, 988 (2002) (citing RCW 48.29.010(3)(c).”

25 ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
 AND GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

1 payment for the title insurance premium to Ticor or Commonwealth. The title insurance policy was
 2 issued but not sent to Kiavi.

3 Months later, on March 4, 2022, Kiavi learned that Rivera had absconded with the money
 4 that Kiavi had wired to ESW in October 2021. On March 10, 2022, Kiavi contacted Rivera for a
 5 copy of the title insurance policy and was advised to request the policy from Ticor. On March 11,
 6 2022, Ticor provided a copy of the policy to Kiavi upon request, and on March 14, 2022, Kiavi
 7 submitted a title claim on the policy through Ticor. Tang initiated a lawsuit (“Tang Lawsuit”) in
 8 King County Superior Court against ESW, Rivera, and Kiavi.² Kiavi requested indemnity and
 9 defense coverage determinations from Commonwealth.

10 Commonwealth denied Kiavi’s claim on June 8, 2022, for failure of consideration because
 11 it had never received payment for the policy. Commonwealth also communicated to Kiavi that
 12 even if coverage existed, the Tang Lawsuit did not state a claim that would trigger coverage, and
 13 the CPL provided protection only as to Ticor as the settlement agent. Commonwealth and Ticor
 14 filed this action on June 14, 2022, seeking a declaration that their denial of coverage is proper. Both
 15 parties have moved for summary judgment in their favor.

16 **III. STANDARD OF REVIEW**

17 “Summary judgment is appropriate when, viewing the evidence in the light most favorable
 18 to the nonmoving party, there is no genuine dispute as to any material fact” and the movant is
 19 entitled to judgment as a matter of law. *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017)
 20 (quoting *United States v. JP Morgan Chase Bank Account No. Ending 8215*, 835 F.3d 1159, 1162
 21

22 ² Kiavi was added as a defendant in the First Amended Complaint on April 22, 2022. Kiavi’s motion to dismiss was
 23 granted, and the case proceeded against ESW and Rivera. Tang has appealed the dismissal.

24 ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
 AND GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

1 (9th Cir. 2016)); Fed. R. Civ. P. 56(a). “The moving party bears the initial burden of identifying
 2 portions of the record that demonstrate the absence of a fact or facts necessary for one or more
 3 essential elements of each claim.” *InteliClear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 657
 4 (9th Cir. 2020). “If the moving party meets this burden, the opposing party must then set out specific
 5 facts showing a genuine issue for trial to defeat the motion.” *Id.* If the evidence proffered by the
 6 opposing party “is merely colorable, or is not significantly probative, summary judgment may be
 7 granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). On
 8 cross-motions for summary judgment, the court must consider each motion separately to determine
 9 whether either party has met its burden with the facts construed in the light most favorable to the
 10 other. *See Fed. R. Civ. P. 56; see also Fair Housing Council v. Riverside Two*, 249 F.3d 1132, 1136
 11 (9th Cir. 2001) (noting the court’s responsibility to determine whether disputed issues of material
 12 fact are present).

13 IV. DISCUSSION

14 As a preliminary matter, the Court will consider what documents comprise the record on
 15 which it rules. Defendant requested that the Court take judicial notice of five exhibits related to the
 16 Tang Lawsuit in the King County Superior Court. Req. Judicial Not., ECF No. 15. Defendant also
 17 moved to strike portions of Plaintiffs’ evidence, specifically, portions of the declarations of David
 18 Littman (ECF No. 18) and Georgia Hallett (ECF No. 17). Def.’s Mot. 15-16.

19 Under Federal Evidence Rule 201, a court can judicially notice an adjudicative fact if it is
 20 “not subject to reasonable dispute.” Fed. R. Evid. 201(b). A fact is “not subject to reasonable
 21 dispute” if it is “generally known,” or “can be accurately and readily determined from sources
 22 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(1)-(2). A court “must take

23 ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
 24 AND GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

1 judicial notice if a party requests it and the court is supplied with the necessary information.” Fed.
 2 R. Evid. 201(c)(2). The requested documents from the Tang Lawsuit are proper subjects for judicial
 3 notice. Since judicial notice of the existence of court records is routinely accepted, the requests for
 4 judicial notice are granted as to the existence of the records but not as to the truth of their contents.
 5 *See, e.g., Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (“Just because
 6 the document itself is susceptible to judicial notice does not mean that every assertion of fact within
 7 that document is judicially noticeable for its truth.”); *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*,
 8 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking notice of court filings and other matters of public
 9 record); *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (noting that a court may take
 10 judicial notice of another court’s opinion, but not of the truth of the facts recited therein).

11 Regarding Defendant’s motion to strike various statements made in two of Plaintiffs’
 12 declarations, the Court does not rely on the statements made in those declarations and finds it
 13 unnecessary to rule on each objection. The Court denies the motion to strike as moot and turns to
 14 the merits of the parties’ arguments on summary judgment.

15 This is an unfortunate case in which a trusted third party caused a loss by misusing escrow
 16 funds. Kiavi contends that Ticor and Commonwealth are obligated to defend and indemnify it
 17 under the title insurance policy; Ticor and Commonwealth assert that although the title insurance
 18 policy was issued, it is void because no payment was ever received for the policy premium, and the
 19 payment of the premium was a condition precedent to its obligations under the title insurance
 20 policy. A condition precedent is a condition or event set out in a contract “occurring subsequent to
 21 the making of a valid contract which must exist or occur before there is a right to immediate
 22 performance.” *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 556-57, 730 P.2d 1340, 1342
 23

24 ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
 AND GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

1 (1987) (citing *Ross v. Harding*, 64 Wn.2d 231, 235, 391 P.2d 526, 530 (1964)). A condition
 2 precedent is contrasted with a promise, which “subjects the promisor to liability for damages, but
 3 does not necessarily discharge the other party’s duty of performance” *Jones Assocs., Inc. v.*
 4 *Eastside Props., Inc.*, 41 Wn. App. 462, 466, 704 P.2d 681, 684 (1985). The nonoccurrence of a
 5 condition precedent “prevents the promisee from acquiring a right or deprives him of one but
 6 subjects him to no liability.” *Id.* “Any words which express, when properly interpreted, the idea
 7 that the performance of a promise is dependent on some other event will create a condition.” *Ross*,
 8 64 Wn.2d at 237; *see also Northwood Est., LLC v. Lennar Nw., Inc.*, 12 Wn. App. 2d 1038 (2020)
 9 (“[W]ords such as ‘provided that,’ ‘on condition,’ ‘when,’ ‘so that,’ ‘while,’ ‘as soon as,’ and ‘after’
 10 suggest a conditional intent, not a promise.” (citation omitted)).

11 In its commitment to Kiavi, Ticor stated:

12 THE COMPANY’S OBLIGATION UNDER THIS
 13 COMMITMENT IS TO ISSUE A POLICY TO A PROPOSED
 14 INSURED IDENTIFIED IN SCHEDULE A IN ACCORDANCE
 15 WITH THE TERMS AND PROVISIONS OF THIS
 16 COMMITMENT.
 17

18 Subject to the Notice; Schedule B, Part I-Requirements;
 19 Schedule B, Part II-Exceptions; and the Commitment Conditions,
 20 Commonwealth Land Title Insurance Company, a Florida
 21 corporation (the “Company”), commits to issue the Policy according
 22 to the terms and provisions of this Commitment. This Commitment
 23 is effective as of the Commitment Date shown in Schedule A for
 24 each Policy described in Schedule A, only when the Company has
 25 entered in Schedule A both the specified dollar amount as the
 Proposed Policy Amount and the name of the Proposed Insured.

26 If all of the Schedule B, Part I-Requirements have not been
 27 met within one hundred eighty (180) days after the Commitment
 28 Date, this Commitment terminates and the Company’s liability and
 29 obligation end.

30 ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
 31 AND GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

1 Preliminary Commitment 1, ECF No. 17-1. The commitment date was September 3, 2021, the
 2 proposed insured was LendingHome Funding Corporation (now Kiavi), and the premium was set
 3 at \$731.06. *Id.* at 2. Under Schedule B, Part I Requirements, it states that “[a]ll of the following
 4 Requirements must be met.” *Id.* at 4. The third listed requirement states: “Pay the premiums, fees,
 5 and charges for the Policy to the Company.” *Id.*

6 Based on the plain language of the contract, payment of the premium is a condition
 7 precedent to Plaintiff’s liability and obligations thereunder. The Court also finds Plaintiffs’ cited
 8 New York title insurance case on point and persuasive. *See* Pls.’ Mot. 9 (citing *GMAC Mortg.*
 9 *Corp. v. Weisman*, No. 95 CIV. 9869(JFK), 1998 WL 132791 (S.D.N.Y. Mar. 23, 1998)). In
 10 *GMAC*, the title insurer issued a title insurance policy to the lender at closing, but the check issued
 11 for payment of the premium was returned for insufficient funds because the escrow agent had
 12 allegedly forged the check. The court found that “payment of the premium was a condition
 13 precedent to liability,” and the “failure to pay the title insurance premiums voided the policies
 14 because there was a complete failure of consideration.” *GMAC*, 1998 WL 132791, at *9.
 15 Although, like here, the lender was a victim of the escrow agent’s misconduct, which resulted in
 16 the title insurance premium remaining unpaid, the court granted summary judgment to the title
 17 insurance company. So too here. Kiavi’s failure to pay the premium constitutes a failure to satisfy
 18 a condition precedent, and the title insurance policy is void.

19 Kiavi also contends that it has a valid claim under the CPL, which provides an independent
 20 basis for imposing contractual liability on Plaintiffs. Def.’s Mot. 12-14. The CPL, dated September
 21 10, 2021, issued to LendingHome Funding Corporation (now Kiavi), states, in relevant part:

22 [Commonwealth] agrees to indemnify You for actual loss of Funds
 23 incurred by You in connection with the closing of the referenced

24 ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
 AND GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

1 real estate transaction [“the Tang transaction”] conducted by the
2 Settlement Agent or Approved Attorney on or after the Date of this
3 letter, subject to the Requirements and Conditions and Exclusions
4 set forth below:

5
6

7 4. Your loss is solely caused by:
8

9 (a) a failure of the Settlement Agent or Approved Attorney to
10 comply with Your written closing instructions . . . ; or
11

12 (b) fraud, theft, dishonesty, or misappropriation by the Settlement
13 Agent or Approved Attorney in handling Your Funds or documents
14 in connection with the closing,
15

16 CONDITIONS AND EXCLUSIONS 17

18 1. Your transmittal of Funds or documents to the Settlement Agent
19 or Approved Attorney for the Real Estate Transaction constitutes
20 Your acceptance of this letter.

21 CPL 2, ECF No. 17-2. The CPL clearly states that the Settlement Agent or Approved Attorney is
22 Ticor Title Company. *Id.* Here, the loss was not solely caused by a failure of Ticor to comply with
23 written closing instructions or by Ticor’s mishandling of the funds, nor did Kiavi wire the funds to
24 Ticor. Rather, Kiavi wired the funds to Rivera’s bank in contravention of Ticor’s wiring instruction,
25 and Kiavi’s loss was caused by Rivera’s misappropriation of the funds. Plaintiffs have no liability
to Kiavi under the CPL.

Under the facts and circumstances of this case, the Court holds that Plaintiffs have no duty
to defend or indemnify Kiavi in the Tang Lawsuit.

ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
AND GRANTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' motion for summary judgment, ECF No. 16; DENIES Defendant's motion for summary judgment, ECF No. 12; GRANTS Defendant's request for judicial notice; and DENIES AS MOOT Defendant's motion to strike. Judgment shall be entered in Plaintiffs' favor.

DATED this 25th day of April, 2023.

Barbara Rothstein

Barbara Jacobs Rothstein
U.S. District Court Judge

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**